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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/593,442
Filing Date: September 19, 2006
Appellant(s): BRISCOE ET AL.

Larry Nixon
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/7/10 appealing from the Office action mailed 3/8/10.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2003/0202469	CAIN	10-2003
2005/0146007	SAADAWI	07-2004

2001/0055290

SEIDEL

12-2001

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. **Claims 1, 4, 6, 8, 11, 13** are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Publication No. 2003/0202469 A1 to *Cain*.

As to claim 1, *Cain* discloses an intermediate node (fig. 1, node 3) for controlling the treatment of data traversing a path (para. 0031-0033, 1-3-5-4 being a path) across a data network from a provider node to a receiver node (fig. 1, node 1 is provider, nodes 4, 5 receivers—specifically node 4), the data network comprising said intermediate node, at least one upstream node (fig. 1, node 1), and a plurality of downstream nodes (fig. 1, nodes 5, 4), the or one of the upstream nodes being arranged to provide data to said intermediate node via a portion of the path between the provider node and the intermediate node (para. 0031-0033, portion of path can be 1-3), the or one of the upstream nodes being arranged to provide path characterization information to said intermediate node via a portion of the path between the provider node and the intermediate node, said path characterization information being dependent on

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information fed back from the receiver node to the provider node (para. 0034-0035, fig. 1, a QoS established path may break at the destination node 4, which sends the source node an error notification (i.e. "information fed back from the receiver node"), causing the source node to start the QoS RREQQ process described in paras. 0031-0033, whereby a RREQQ message (i.e. "path characterization information") is then sent from source node 1 to intermediate node 3, where the intermediate node 3 then processes the RREQQ message and transfers it further downstream), and said downstream nodes being arranged to receive data via respective portions of paths between the intermediate node and the receiver node (para. 0031-0033, QoS parameter link metric in RREQQ message sent from node 1 and traverses path 1-3-5-4, nodes 5 and 4 being downstream from node 3, 3-5 being a portion, and 3-5-4 being a portion); said intermediate node comprising:

means for receiving data from an upstream node (para. 0031-0033, node 3 (i.e. the intermediate node) receives data from node 1 (i.e. the source node, which is also an upstream node));

means for receiving path characterization information from an upstream node, and for deriving therefrom information indicative of a characteristic of a portion of the path between the intermediate node and the receiver node (para. 0031-0033, *intermediate node 3 receives RREQQ message from upstream node 1, and based upon this message updates the QoS metric (i.e. "information indicative of a characteristic") and reserves resources (i.e. the ability of the node to reserve resources being the "characteristic of a portion of the path", because the metric is updated when resources*

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are reserved at that node) at node 3 and then forwards the message to node 4, and this resource reservation that indicates node 3 can support the QoS is indicative of "a portion" of the path between node 3 and 4, as node 3 itself is "a portion" of this path);

means arranged to select, in dependence on said information indicative of said characteristic, a preferred manner of treatment for data to be forwarded (para. 0031-0033, because data must travel to node 4, the QoS route request RREQQ is forwarded from node 3 to other downstream nodes of the current intermediate node so that it can eventually reach node 4 (which is a manner of treatment), the intermediate node, after receiving the RREQQ, is able to reserve resources (i.e. this being the "characteristic") and also update the QoS metric (i.e. this being the "said information"). Based upon this reservation and QoS metric update (i.e. dependent upon "said information indicative of said characteristic"), a forwarding to other intermediate nodes 2 and 5, which is "a preferred manner of treatment for data to be forwarded" from the intermediate node 3, occurs); and

means for forwarding data to a downstream node according to said preferred manner (para. 0031-0033, forwarding data through paths 1-3-5-4, i.e. the intermediate node 3 forwards the RREQQ downstream to node 5).

As to claim 4, *Cain* further discloses an intermediate node according to claim 1, wherein the data provided to said intermediate node comprises said path characterization information (para. 0031-0033, QoS request is made up of a link metric pertaining to bandwidth, error rate, end-to-end delay, etc. which pertain to the path).

As to claim 6, *Cain* further discloses an intermediate node according to claim 1, wherein the intermediate node shares computational resources with an upstream or a downstream node (para. 0031-0033, QoS request is made up of a link metric pertaining to bandwidth, error rate, end-to-end delay, etc. which pertain to the path, and these are computational resources pertaining to the path, and they are updated as the link metric traverses the system).

As to claim 8, see similar rejection for claim 1. The node teaches the method.

As to claim 11, see similar rejection for claim 4. The node teaches the method.

As to claim 13, see similar rejection for claim 6. The node teaches the method.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. **Claims 2-3, 7, 9-10, 14** are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Publication No. 2003/0202469 A1 to *Cain* in view of U.S. Publication No. 2004/0146007 A1 to *Saadawi et al.* ("*Saadawi*").

As to claim 2, *Cain* does not expressly disclose an intermediate node according to claim 1, wherein the selection of a preferred manner of treatment for data to be forwarded on a downstream path relates to selection of a preferred downstream path.

Saadawi discloses a FCP generated by a source node travels towards a destination node through intermediate nodes, and once the FCP arrives at an intermediate node, the stored weights of the intermediate node's neighbors are used in selecting the next node to send the FCP to (para. 0054), i.e. this is the preferred path based upon weighting.

Cain and *Saadawi* are analogous art because they are from the same field of endeavor regarding routing.

At the time of invention, it would have been obvious to a person of ordinary skill in the art to incorporate the weighted selection as taught by *Saadawi* into the invention of *Cain*. The suggestion/motivation would have been to aid in determining the next node to send an FCP to (*Saadawi*, para. 0054).

As to claim 3, *Cain* does not expressly disclose an intermediate node according to claim 1, wherein the selection of a preferred manner of treatment for data to be forwarded relates to selection of one or more of the following: (i) traffic engineering; (ii) route advert verification; (iii) contract verification; (iv) differentiated service gateways.

Saadawi discloses a FCP generated by a source node travels towards a destination node through intermediate nodes, and once the FCP arrives at an intermediate node, the stored weights of the intermediate node's neighbors are used in selecting the next node to send the FCP to (para. 0054), i.e. this is the preferred path based upon weighting. Furthermore, the weights are used in conjunction with a probability routing table (para. 0054, 0050), i.e. this is a form of traffic engineering as a flow of traffic is constructed based upon weight parameters.

Cain and *Saadawi* are analogous art because they are from the same field of endeavor regarding routing.

At the time of invention, it would have been obvious to a person of ordinary skill in the art to incorporate the weighted selection as taught by *Saadawi* into the invention of *Cain*. The suggestion/motivation would have been to aid in determining the next node to send an FCP to (*Saadawi*, para. 0054).

As to claim 7, *Cain* does not expressly disclose an intermediate node according to claim 1, wherein the means arranged to select a preferred manner of treatment for data to be forwarded comprises means for selecting one of said downstream nodes as a preferred downstream node; and wherein the means for forwarding data according to said preferred manner comprises means for forwarding data to said preferred node.

Saadawi discloses a FCP generated by a source node travels towards a destination node through intermediate nodes, and once the FCP arrives at an intermediate node, the stored weights of the intermediate node's neighbors are used in selecting the next node to send the FCP to (para. 0054), i.e. this is the preferred path based upon weighting. Furthermore, the weights are used in conjunction with a probability routing table (para. 0054, 0050), i.e. this is a form of traffic engineering as a flow of traffic is constructed based upon weight parameters.

Cain and *Saadawi* are analogous art because they are from the same field of endeavor regarding routing.

At the time of invention, it would have been obvious to a person of ordinary skill in the art to incorporate the weighted selection as taught by *Saadawi* into the invention

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of Cain. The suggestion/motivation would have been to aid in determining the next node to send an FCP to (Saadawi, para. 0054).

As to claim 9, see similar rejection for claim 2. The node teaches the method.

As to claim 10, see similar rejection for claim 3. The node teaches the method.

As to claim 14, see similar rejection for claim 7. The node teaches the method.

5. **Claims 5, 12** are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Publication No. 2003/0202469 A1 to *Cain* in view of U.S. Publication No. 2001/0055290 A1 to *Seidel et al.* ("*Seidel*").

As to claim 5, *Cain* does not expressly disclose an intermediate node according to claim 1, the data network comprising a data channel for the forwarding of data between nodes and a control channel for providing path characterization information to the intermediate node, wherein the upstream node arranged to provide data to said intermediate node is a node of the data channel, and the upstream node arranged to provide path characterization information to said intermediate node is a node of the control channel.

Seidel discloses a data channel transmits protocol data units (PDUs), and a control channel which is independent of the data channel transmits sequence numbers (SNs), and both of these channels operate using a QoS level (para. 0019-0022), i.e. data is sent across the data channel, and SNs, which characterize the path by providing information about data units that must be sequentially received via the path (in other words, there are 'x' amounts of PDUs and this is the order they must be received in over

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the path), are transmitted across the control channel. Additionally, the SNs of the control channel identify whether incremental redundancy is used or not, and this reconfigures the receiver to an on/off state for incremental redundancy (para. 0050), i.e. this is more path characterization information, as the receiver in the path can change states based upon the SNs.

Cain and *Seidel* are analogous art because they are from the same field of endeavor regarding data processing.

At the time of invention, it would have been obvious to a person of ordinary skill in the art to incorporate the data and control channels as taught by *Seidel* into the invention of *Cain*. The suggestion/motivation would have been to provide for additional performance gain (*Seidel*, para. 0019).

As to claim 12, see similar rejection for claim 5. The node teaches the method.

(10) Response to Argument

6. Appellant's arguments filed 9/7/10 have been fully considered but they are not persuasive.

A. Regarding the allegations that Claims 1, 4, 6, 8, 11, and 13 are not anticipated by Cain

In the arguments, Appellant contends *Cain* does not teach the claimed limitations of independent claims 1 and 8.

In particular, Appellant specifies that in claims 1 and 8, which Appellant admits to being an analogous apparatus and method, each and every one of the steps are performed by the intermediate node itself (page 16, Appeal Brief). The Examiner

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agrees, and has construed the "intermediate node" of Cain (i.e. node 3 in Cain) to perform the claimed steps. Claim 1 is taken to be the representative claim.

Firstly, Appellant argues that only the "source node" of Cain can perform the claimed "selecting a manner of treatment for data to be forwarded" (page 16, Appeal Brief).

The Examiner respectfully disagrees. Claim 1 recites "means arranged to select, in dependence on said information indicative of said characteristic, a preferred manner of treatment for data to be forwarded". As is cited above, and at para. 0031-0032 of Cain, a QoS route request RREQQ is received by intermediate node 3. This request contains information regarding a QoS parameter. If the intermediate node can support the QoS parameter, the node updates the QoS link metric, and forwards the QoS route request to other intermediate nodes 2 and 5. The ability to reserve resources is interpreted as being the "characteristic" and the updated QoS metric interpreted as being the "information" that indicates the "characteristic" (because the metric is updated when resources can be reserved at that node). Clearly, the intermediate node, after receiving the RREQQ, is able to reserve resources. Based upon this, a forwarding to other intermediate nodes 2 and 5, which is "a preferred manner of treatment for data to be forwarded" from the intermediate node 3, occurs.

Appellant then erroneously states only the initial steps of claims 1 and 8 are performed by Cain's intermediate node 3 (page 17, Appeal Brief). Again, as is pointed out in section (9) above, all steps of claims 1 and 8 are performed by the intermediate node 3.

Appellant describes the process of a source node sending RREQQ messages through intermediate nodes that eventually reach a destination node. However, Appellant alleges that the RREQQ messages “only provide information on the required/requested QoS metrics for a suitable downstream path – not on actual fed-back QoS metrics of the downstream path” and therefore Cain does not provide any “means...for deriving therefrom information indicative of a characteristic of a portion of the path between the intermediate node and the receiver node” (page 18, Appeal Brief).

The Examiner respectfully disagrees. Firstly, in response to appellant's argument that the references fail to show certain features of Appellant's invention, it is noted that the features upon which Appellant relies (i.e., “fed-back QoS metrics of the downstream path”) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

What is actually claimed is “the or one of the upstream nodes being arranged to provide path characterization information to said intermediate node via a portion of the path between the provider node and the intermediate node, said path characterization information being **dependent on information fed back** from the receiver node to the provider node”. “Information” is not the same as “QoS metrics”, and is actually a broader term.

As is clear from para. 0034-0035, and also fig. 5 steps 118, 120, and 102, a QoS established path may break at the destination node 4 (i.e. “receiver node”). The receiver node then sends the source node 1 (i.e. “provider node”) an error notification

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(i.e. "information" being the error notification, and this is fed back to the source). The provider node then starts the QoS RREQQ process described in paras. 0031-0033, which leads to RREQQ messages reaching intermediate node 3. The RREQQ messages the Examiner has been referring to in the rejection and in this Examiner's answer are those that occur *after* the source node receives the error notification and then transmits the RREQQ messages. Clearly, the RREQQ messages ("path characterization information") is dependent on information that is fed back, because the QoS error message is what causes the source node to transmit the RREQQ messages. Even if one were to take "information" to be "QoS metrics", Cain still teaches this, as a "QoS error message" is still considered to be a "QoS metric" since it indicates a state of the QoS.

Therefore, as was pointed out earlier, Cain does teach "means...for deriving therefrom information indicative of a characteristic of a portion of the path between the intermediate node and the receiver node" because the RREQQ used in teaching this limitation (which was discussed in detail six paragraphs earlier) is dependent upon a fed back QoS error message.

Appellant again erroneously states that "intermediate nodes only perform the task of accepting or rejecting the request based on desired QoS information relating to the upstream path (i.e. because the QoS metrics in the RREQQ messages do not depend on information received from the destination)" (page 19, Appeal Brief). Again, as the Examiner has stated before, the RREQQ messages ("path characterization information") is dependent on information that is fed back, because the QoS error

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message is what causes the source node to transmit the RREQQ messages (fig. 5, para. 0034-0035).

Appellant states that "according to the Final Office Action's own discussion, it is not Cain's intermediate node 3, but rather source node 1, that makes relevant routing decisions" and then Appellant goes on to mention that node 1 does not teach the claimed limitations. The Examiner never specified node 1 as performing the steps in the independent claims. Node 1 is taken to be the upstream node and the provider node in the claims, whereas node 3 is taken to be the intermediate node that performs the claimed steps.

Appellant argues that the Final Office Action's analysis is incorrect in particular regarding the last two limitations of claim 1. Appellant argues that the statement of forwarding of data along the path of 1-3-5-4 is a path from the source node 1 and therefore the intermediate node 3 cannot have made the selecting decision in relation to the manner of treatment in question (pages 20-21, Appeal Brief).

The Examiner disagrees. The Examiner cited para. 0031-0033 for the last limitation of claim 1 "means for forwarding data to a downstream node according to said preferred manner" to be forwarding data through paths 1-3-5-4. The Examiner was meaning to illustrate the entire path the RREQQ message takes from source 1, through intermediate node 3 to intermediate node 5 and finally to destination node 4. As was discussed earlier the limitation preceding the final limitation mentions "means arranged to select...a preferred manner of treatment for data to be forwarded" and was shown to be done at intermediate node 3. The Examiner's argument to this limitation is again

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provided: ["a QoS route request RREQQ is received by intermediate node 3. This request contains information regarding a QoS parameter. If the intermediate node can support the QoS parameter, the node updates the QoS link metric, and forwards the QoS route request to other intermediate nodes 2 and 5. The ability to reserve resources is interpreted as being the "characteristic" and the updated QoS metric interpreted as being the "information" that indicates the "characteristic" (because the metric is updated when resources can be reserved at that node). Clearly, the intermediate node, after receiving the RREQQ, is able to reserve resources. Based upon this, a forwarding to other intermediate nodes 2 and 5, which is "a preferred manner of treatment for data to be forwarded" from the intermediate node 3, occurs."]

Thus, the final limitation is also performed at the intermediate node 3, because node 3 "forwards data to a downstream node according to said preferred manner" because it forwards the RREQQ to downstream intermediate node 5 (as was proven in the paragraph above this).

For these reasons, it is clear that *independent claim 1*, and similarly *independent claim 8* (which Appellant admits are an analogous apparatus and method and that the alleged deficiencies with respect to claim 8 apply with equal force to claim 1, page 16, Appeal Brief) are in fact taught by the Cain reference.

Appellant also argues that the rejection to dependent claim 4 is flawed because the RREQP messages are not based on feedback. The Examiner disagrees. The Examiner assumes Appellant meant "RREQQ messages" rather than "RREQP messages" as the latter was not cited. The Examiner has shown numerous times that

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from para. 0034-0035, and also fig. 5 steps 118, 120, and 102, a QoS established path may break at the destination node 4 (i.e. "receiver node"). The receiver node then sends the source node 1 (i.e. "provider node") an error notification (i.e. "information" being the error notification, and this is fed back to the source). The provider node then starts the QoS RREQQ process described in paras. 0031-0033, which leads to RREQQ messages reaching intermediate node 3. The RREQQ messages the Examiner has been referring to in the rejection and in this Examiner's answer are those that occur after the source node receives the error notification and then transmits the RREQQ messages.

Claim 8 is similar to claim 1, claim 11 is similar to claim 4, claim 13 is similar to claim 6. The nodes teach the methods.

B. Regarding the allegations that Claims 2-3, 7, 9-10, and 14 are not unpatentable over Cain and Saadawi

In the arguments, Appellant contends Cain and Saadawi does not teach the claimed limitations of dependent claims 5 and 12 (page 23, Appeal Brief). The Examiner assumes Appellant meant claims 2 and 9, since they are rejected under Cain and Saadawi. Claims 5 and 12 are rejected under Cain and Seidel.

Regarding claims 2 and 9, Appellant alleges that Cain's not teaching of an intermediate node capable of selecting a preferred downstream path contradicts the Cain reference's use in the independent claims (page 23, Appeal Brief). The Examiner fails to understand the Appellant's reasoning. Cain was used to teach the independent node's selecting of a preferred manner of treatment. Saadawi is used to teach that this

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selection pertains to a preferred downstream path. This term of a "preferred downstream path" is not mentioned in the independent claims, hence there is no contradiction of the Cain reference.

Appellant argues that because the FCP message of Saadawi is generated at the source node without feed back, and because Cain does not teach a feed back mechanism, this is allegedly an improper combination of references. However, Cain does teach generating messages based upon feedback. This was discussed fully in the section regarding claims 1 and 8. The Saadawi reference is merely used to teach that the FCP messages (i.e. similar to the RREQQ messages of Cain) are generated by a source node and are then received by an intermediate node. The intermediate node in Saadawi uses weights to choose a preferred pathway to further transmit the FCP messages downstream (Saadawi, para. 0054). Additionally, in response to Appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellant argues that improper hindsight is used (page 23, Appeal Brief). In response to Appellant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include

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knowledge gleaned only from the Appellant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant also argues there is no FCP or need to determine a destination in the Cain reference and attacks the motivation used by the Examiner (pages 23-24, Appeal Brief). The Examiner disagrees, as RREQQ messages in Cain are similar to FCP messages in Saadawi, as they are both sent from a source, through intermediate nodes, and finally to a destination. The Saadawi reference merely shows more details as to how a message is forwarded downstream. In response to Appellant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, motivation comes from para. 0054 of the Saadawi reference (i.e. to aid in determining the next node to send an FCP to).

C. Regarding the allegations that Claims 5 and 12 are not unpatentable over Cain and Seidel

In the arguments, Appellant contends Cain and Seidel does not teach the claimed limitations of dependent claims 5 and 12 because Cain contains several deficiencies and that Seidel does not make up these deficiencies (page 24-25, Appeal

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Brief). The Examiner disagrees. Firstly, regarding claims 5 and 12, Appellant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references. And secondly, these claims are clearly addressed in the rejection (see section (A), above), completely following the KSR guidelines.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Omar Ghowrwal

/O. G./

Examiner, Art Unit 2463

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/Derrick W Ferris/

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